IN THE

Supreme Court of the United States

October Term, 1942

No. 622

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF

Two important questions were raised by the petition in this proceeding. First, it is contended that the evidence does not sustain the charge nor the finding of fact and the conclusion of law that Gerity-Adrian Manufacturing Corporation is the "*alter ego*" of The Gerity-Whitaker Company. Second, it is sincerely contended by the petitioners that the remedy invoked by the Board and approved by the enforcement order is unlawful in that there is no legal justification for the provision in said order directing reinstatement to a temporary position with back pay from January, 1937, to the persons designated in said order.

In the brief of the respondent, it is stated (pp. 2 and 15) "That apart from business considerations, a substan-

tial cause of the transfer to Blissfield and then to Adrian of part of the Toledo business and equipment was petitioner, Gerity-Whitaker Company's plan to thwart metal polishers and to evade its obligations under the contract with the Union and under the Act."

The foundation of the complaint in this case against these petitioners is the charge that The Gerity-Whitaker Company transferred its manufacturing operations out of Toledo and into Michigan; that the alleged transfer was the result of a plan to evade a contract with the Union of its employees; that Gerity-Adrian Manufacturing Corporation, organized in Michigan in 1937, is the "*alter ego*" and agent of The Gerity-Whitaker Company and that Gerity-Adrian is in fact Gerity-Whitaker.

If Gerity-Whitaker established a runaway shop or transferred its business into another state, under a different name, the record should disclose some evidence of participation in this scheme or plan by The Gerity-Whitaker Company and its owner. In answer to this proposition, permit us to point out the following undisputed facts:

1. It is conceded that at all times James J. Gerity "still held all the stock in the company (Gerity-Whitaker Company), except for the qualifying shares and refused to comply with his son's request for a redistribution of the stock." (R. p. 119.)

2. It is conceded that James J. Gerity, owner of Gerity-Whitaker Company, never participated in the establishment or in any business in Blissfield or Adrian (R. p. 61) and that neither James J. Gerity nor Gerity-Whitaker Company hold any stock in Gerity-Adrian; that neither of them have ever received any consideration from Gerity-Adrian except for work performed for that company. (R. pp. 395, 396, 397, 439, 456, 457.)

3. It is conceded that neither James J. Gerity nor Gerity-Whitaker Company have ever participated in the formation, management, direction or policy of any business in Michigan, or of Gerity-Adrian Manufacturing Corporation. (R. p. 61 and references under No. 2 above.)

4. It was proven that the investment in machinery and equipment of James Gerity, Jr., in the Michigan business was $13,750.00 (R. p. 579) of which amount only $1,800.00 of machinery and equipment was acquired from Gerity-Whitaker Company. (R. p. 223.)

5. The Board could only find suspicion in the manner of transfer by Gerity-Whitaker Company of accounts recorded in 1936 to James Gerity, Jr., at Adrian, Michigan (R. p. 126, "The suspicious circumstances inhering in respondent's treatment of accounts transferred from Gerity-Whitaker to Gerity-Adrian as property of James Gerity, Jr.").

6. The absolute disregard by the Board and counsel for the facts and evidence hereinabove referred to and the refusal of the Board and counsel to concede the possibility of the conflict in the business objectives and policy of James J. Gerity and James Gerity, Jr., to effect and bring about their separation as partners and to conduct their independent business enterprises.

7. The failure of counsel or the Board to discuss and declare the legal considerations, essentials and elements of the doctrine of *"alter ego"* and of "the runaway shop" as applied to the evidence in the proceeding. The record contains no evidence of any act or plan on the part of Gerity-Whitaker to establish a runaway shop. There was no labor dispute. There was no diminution in employment for a matter of twenty months after the alleged establishment of a runaway shop. There is no evidence that Gerity-

Whitaker Company has directly or indirectly participated in the formation, operation or direction of Gerity-Adrian or received any return or made any investment in that business, all of which considerations are essential to the proof of the doctrine of *"alter ego"* and necessary conditions to the legal conclusion justifying and sustaining such a judgment.

The suggestion is made for some reason on page 3 of respondent's brief that "Gerity-Whitaker was operated as a non-union shop until October 21, 1935." There is not a single word of testimony or a shred of evidence in the record that The Gerity-Whitaker Company ever operated a non-union shop. We are no experts on labor law, but it has always been our understanding that a non-union shop was one where union men were not employed; that an open shop was one where organized and unorganized workers were employed; that a closed shop was one where only organized workers were employed. Until now, there was never any suggestion that The Gerity-Whitaker Company operated a non-union shop. The business agent of the Union testified (R. p. 181) that union men were employed when he was hired by The Gerity-Whitaker Company in the year 1934.

We also wish to point out that when the Board quotes from the testimony of the only witness who testified that James Gerity, Jr., proposed to get away from Union interference by starting a business in the State of Michigan and when respondent refers to this testimony in the brief, but half the statement of the witness is quoted and that portion which supports the testimony of Mr. Gerity is omitted. We quote from the record, page 249, the answer of the witness, John Eldridge, as follows:

> "He (James Gerity, Jr.) made the statement that inasmuch as he and his father could not agree on all subjects, he decided to get out for himself. He

started up his own plant, and he said along with him and his father's difficulties, that it seemed as though it was hard to get along with the Union and he said he was going to get away from the Union's interference."

On page 9 of respondent's brief, it is argued "In February, 1937, when representatives of the Metal Polishers complained to Gerity, Sr., that The Gerity-Whitaker Company was operating a runaway shop, Gerity, Sr., did not deny the accusation, but assured them that things would be straightened out."

What does the record disclose? The record discloses that the business agent of the Union complained that in December, 1936, employment was "practically cut right down to nothing." On the day the meeting with the employer occurred, Exhibit 41 (R. p. 560) shows thirty-eight men were employed and that in December of 1936 several times the total average employment was on the payroll of the employer. In this connection, the Board finds among its conclusions of fact (R. p. 121) "The normal average employment was thirty to forty employees."

On page 15 of respondent's brief, it is stated "Petitioners contend also that there is not substantial evidence to support the Board's finding that The Gerity-Whitaker Company refused to bargain with the Metal Polishers and that petitioners discriminated in regard to hire and tenure of employment of thirty-one of its employees. These contentions present no questions of general importance. Moreover, they are without merit."

At the risk of being repetitious, permit us to point out what we believe to be the undisputed and material evidence on this point.

1. Seventeen of the persons ordered reinstated with allowance of three or more years back pay were undisputedly shown to have been temporary employees, hired approximately six months after the runaway shop is alleged to have been established and their employment occurred at a time when Gerity-Whitaker Company was hiring more than double its normal number of workmen. (R. pp. 411, 412, 435; Stipulation 465-66-67, 470, 471.)

2. The Board found (R. p. 121) that on January 15, 1937, about eighty employees were laid off at the Toledo plant, which for the preceding ten weeks had been employing about three times its normal complement of thirty to forty employees.

3. The Gerity-Whitaker Company continued to employ its normal complement of thirty to forty employees on the average weekly basis during the year 1937.

4. For the week ending November 27, 1936, Gerity-Whitaker Company gave employment to one hundred and twenty-eight workmen (Board Ex. 41-R, p. 560). This date was about eight months after it is charged the petitioner transferred operations into another state by the device of a runaway shop. During this particular week employment was three and a half times average normal employment on the basis of the preceding three-year average.

5. Of the approximately ninety extra and temporary employees, seventeen have been ordered reinstated, presumably to full time employment with full time pay from January, 1937. There is no reason why, if seventeen temporary employees could be ordered reinstated with back pay, the additional seventy-three employees could not like-

wise be granted the same remedy. Thus, the remedy which the Board has invoked and which the respondent would have sustained could clearly require the employer to hire and pay three or more times its average number of employees. The only connection or foundation for the granting of such remedy would apparently be the fact that the persons ordered reinstated had temporary employment at one time with such employer.

When counsel charged (Brief p. 18) that "The employment of all the thirty-one employees ceased because of petitioners' unfair labor practices," the answer seems to suggest itself that employment was given to eighty or ninety unemployed members of this Union, even though it was temporary, when such workmen were without employment at their usual and regular places of employment in Toledo. Since the employer in 1936 regularly hired only from thirty to forty workmen and gave temporary employment to one hundred and twenty workmen, it did not engage workmen who had previously been employed by it or who were on its payroll when it is asserted the runaway shop was set up in March and April of 1936. To the contrary, it seems clear that in 1936 and 1937, Gerity-Whitaker Company increased employment and that this undisputed fact dissolved the foundation upon which the complaint against it is laid.

We respectfully urge that the questions involved in this proceeding are not without merit; that the reversal of the unlawful and unauthorized order is required to remove a dangerous and unlawful precedent.

Respectfully submitted,

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HALL & DEVLIN,
Counsel for Petitioners.